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Supreme Court of the United States

OCTOBER TERM, 1955

No. 341

ELIE J. BOUDOIN,
Petitioner,

versus

LYKES BROS. STEAMSHIP COMPANY, INC.,
Respondent.

Brief in Opposition to Petition for a Writ of Certiorari

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Of Counsel

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STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

In the District Court petitioner claimed that the blow he received aboard respondent's vessel caused permanent injury to his brain. The denial by respondent of this assertion raised a purely factual issue for the Trial Court's decision. The Trial Court, after reviewing the evidence and hearing all of the medical witnesses in open court, rejected peti-

tioner's claim, and the judgment thereon was affirmed by the Court of Appeals.[1]

The somewhat voluminous evidence from which the courts below rejected petitioner's claim of brain damage was derived from at least five sources: (1) petitioner's testimony; (2) petitioner's medical expert; (3) respondent's expert; (4) the findings of the doctors at the Public Health Service Hospital; (5) and numerous exhibits from which inferences could and undoubtedly were drawn concerning petitioner's medical and employment capacity before and after the trauma aboard the MASON LYKES.

Without detailing all the evidence, briefly the record shows that petitioner from childhood suffered from and from time to time was disabled with a chronic osteomyelitis of the leg, a disease which incapacitated him for military service in the last war, R. 119. On two occasions after the trauma in question, this chronic ailment required in-patient medical attention, R. 120. Probably because of this pre-existing incapacity, for otherwise it remains unexplained,

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[1]Actually, as the Court of Appeals stated in its first opinion on liability, 211 F. (2d) 618, petitioner "attempted belatedly to appeal because of inadequacy . . .", since the judgment of the District Court was entered on May 22, 1953 but the appeal by petitioner to the Court of Appeals was not taken until July 21, 1953. While respondent filed motions in the District Court for a new trial, those motions did not accrue to the benefit of petitioner or extend his time to appeal if he were dissatisfied with the judgment. Rule 73 of the Federal Rules of Civil Procedure, *Continental Casualty Co.* vs. *United States*, 167 F. (2d) 107 (C.C.A. 9th 1948). In addition, it is well established that the trial court's assessment of damages will not be considered by an appellate court where no objection was made by the complaining party in the lower court and no opportunity was presented to the Trial Judge to correct the alleged error. See *Capella, et al* vs. *Zurich Gen. Acc. Liability Ins. Co., et al*, 194 F. (2d) 558, 560 (C.C.A. 5th 1952), and the record will show that no such effort was made by petitioner.

petitioner's maritime service was always erratic, as his Coast Guard record shows clearly that he rarely remained aboard one vessel, even before joining respondent's ship, longer than a few weeks at a time, and that he never sailed more than four to five months in any one year. Thus, the usual inference of genuine disability drawn from proof of full capacity for work before, and lack of such capacity after, an accident, did not here arise.

The injury aboard the MASON LYKES did not cause unconsciousness, and petitioner's condition thereafter did not indicate the presence of internal injury, R. 113 - 114. Brain damage from trauma is, of course, usually associated with immediate unconsciousness, and a lack of it, as established conclusively at the trial, spoke against petitioner's position, R. 185.

Petitioner was discharged as *fit for duty* by the Public Health Service doctors, the only impartial medical observers

to examine petitioner, on February 21, 1950, less than three months after the trauma.[2] It is of course significant that the Trial Judge found that petitioner's disability terminated on February 21, 1950. See Findings of Fact, No. 26. After his discharge from the hospital, petitioner did not thereafter receive or even seek additional medical attention for the injury (R. 120), despite the fact that, as has been said, he did seek and receive in-patient treatment on two occasions thereafter for his chronic leg condition, R. 120. During those years following his hospital discharge he worked for a time at sea and also ashore, driving a truck, operating a taxi, etc., and, on each job, always performed his work with regularity, R. 108-109. All of these facts spoke against petitioner's claim and no doubt weighed heavily in the Trial Court's award.

The first examination by petitioner's medical expert was not held until December, 1952, over three years after the

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[2]The findings covering petitioner's in-patient treatment just prior to his discharge from the hospital on February 21, 1950 are as follows:

Clinical Record

Date of Admission ..... Feb. 15, 1950
Date of Discharge ..... Feb. 21, 1950
Number of days hospitalized 6

Twenty-four year old American Seaman admitted for diagnostic work-up for alleged headaches since being hit on the head with a bottle on the SS MASON LYKES. *There was no history of unconsciousness and no other significant symptoms. P E X, including thorough neurological exam was negative for significant findings. Lumbar puncture revealed normal dynamics and chemistry cytology. Sulphates were negative. The E N T consultant who saw patient as out-patient, found no significant abnormalities. It is our impression that this man does not have any physical defect attributable to the alleged injury.*
J. C. Wright, S. A. Surgeon

X-Ray Report, 2/16/50

Skull Plates

No evidence of bone injury. There is a small area of calcification seen in the lateral film in the posterior portion of the skull the exact location and nature of which is unknown.

injury, R. 9. As petitioner has stated, this doctor reported finding three neurological signs and also related having noted a scar at the site of the injury, which the doctor stated indicated injury to the cerebellum, R. 11. However, on cross-examination, the strength of this testimony was diluted by the necessary admission that two of his objective findings (the facial asymmetry and nystagmus), could very well have been congenital in origin and not referrible to the injury. The Trial Judge obviously placed small trust in the conclusion of this doctor that petitioner was suffering from traumatic brain damage, since the doctor admitted that he had made no effort to determine whether or not nature, rather than trauma, was in fact the source of these positive signs, R. 24-25; 27-28; 34; 38; 41.

Respondent's medical expert first examined petitioner in August, 1950, just nine months after the trauma and two years and four months before petitioner was first seen by his own expert, and again shortly before the trial. *This neurologist stated categorically that petitioner did not sustain brain injury from the MASON LYKES episode.* His neurological examinations were entirely negative except for "questionable hypoesthesia" at the site of the scar, R. 168; 177, and the facial asymmetry reported also by the opposing doctor. However, as to these findings, the doctor added without reservation that *the facial asymmetry was beyond doubt congenital, not traumatic, in origin, and that the hypoesthesia was insignificant from a neurological standpoint*, R. 170; 179. Regarding the nystagmus and Babinski reported by petitioner's doctor, this doctor testified that these findings did not in fact exist, and added that in any event they were not neurologically significant without additional associated neurological deficiencies, which in this

case do not exist, R. 170; 173-174. Finally, this doctor testified that the scalp scar was not in the area of the cerebellum, as petitioner's expert had testified, but was at the mastoid and posterior parietal regions of the head and that the scar did not in the least suggest internal injury at that region, R. 182.

ARGUMENT

As can be seen, on the above record the question concerning petitioner's alleged brain damage turned exclusively on issues of fact. There was conflicting evidence on the issue, and of course the conflicts were for the District Court to resolve. The factual findings made by the District Judge were substantiated by the Public Health Service Hospital records, as well as by respondent's medical testimony. The Trial Judge, in resolving the conflicts between the Public Health Service findings and respondent's neurologist on the one hand, and the conclusion of petitioner's expert on the other, did not, as petitioner asserts, find that "petitioner . . . had brain damage"; he rather merely stated in passing that "some" tests indicated brain damage of "some kind". The important finding on this issue, ignored by petitioner, was that petitioner's trauma caused only "concussion and lacerations" and that the disability resulting therefrom lasted until February 21, 1950, see Trial Court's Findings of Fact, Nos. 10 and 26. Accordingly, on the record, not only was the asserted brain damage only an issue of fact, but on the scanty evidence offered by petitioner to support his claim the Trial Court was wholly justified in the conclusion it reached.

Petitioner's invocation of the doctrine laid down in *McAllister*[3] seems to us wholly out of place here, for that decision, far from standing for the position maintained by petitioner, represents to us the zenith of this Court's holding that findings of fact made by a District Judge are not to be disturbed on appeal.

CONCLUSION

It is respectfully submitted that the decisions of the two courts below on this pure question of fact are in accordance with law, are not "clearly erroneous" but, on the contrary, were a proper resolution of conflicting medical evidence, and therefore there is no basis for the granting of the writ, and thus certiorari should be denied.

Respectfully submitted,

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[3]347 U. S. 932, 75 S. Ct. 6 (1954).

CERTIFICATE

I certify that I have served copies of the foregoing brief on counsel for all parties of record by mailing them to their respective offices, this _____ day of _____, 1956.

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William E. Wright